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The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision

Aileen Moreton-Robinson
University of Queensland

Race is fundamental in shaping the development of Australian law just as it has played its part in other former colonies, such as the United States, where a body of critical race theory has been established on the basis of this premise. Drawing on this theory I argue that the possessive logic of patriarchal white sovereignty works ideologically to naturalise the nation as a white possession by informing and circulating a coherent set of meanings about white possession as part of common sense knowledge and socially produced conventions in the High Court's Yorta Yorta decision.

Is there any knowledge in the world which is so certain that no reasonable [person] could doubt it? (Bertrand Russell 1983:1).

Introduction

1. After the Mabo decision, the subsequent introduction of the *Native Title Act* (1993) and extensive community consultation, the Yorta Yorta people decided in January to lodge an application for determination of native title with the national Native Title Tribunal (Atkinson 2000:1-8). The Native Title Tribunal accepted the application and began mediation with interested parties to the claim. As no mediated agreements could be reached through the Tribunal's processes, in April 1995 the application was lodged in the Federal Court. In preparation for the arduous task before them, the Yorta Yorta prepared for trial by collecting as much evidence as possible to substantiate their case. They carried out extensive archival and field research as well as employing experts to assist in developing different forms of evidence. *The Age* newspaper reported that the evidence occupied 15 metres of shelf space in the Judge's chambers.

2. In December 1998, the primary judge of the Federal Court, Justice Olney found that

> the facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional lands in accordance with their traditional laws and any real observance of their traditional customs' (Gaurdron & Kirby 2001: para 107).

On the basis of this determination the Yorta Yorta appealed to the Full Court of the Federal Court where two of the three judges dismissed the appeal. By special leave the Yorta Yorta then appealed to the High Court, which gave its determination on the 12th of December 2001. Five of the seven Justices agreed that, 'the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs' (Gleeson, Gummow & Hayne 2001: para 96).

3. Apart from reports in the press, there has been little engagement with the High and Federal Courts' decisions regarding the Yorta Yorta. There appears to be virtually no critique from bodies such as law societies, bar associations and the international Commission of Jurists who are part of the normative system of law. Only a few critiques by individual lawyers, historians and political scientists have been made addressing legal, political and historical issues (Pearson 2003; Buchan 2002, Paul & Gray 2002, Seidel 2004). However, their work tends to overlook the fundamental role that race played in the development of the decision. Perhaps this is because politicians and the media believe that 'race' no longer matters in 'settler' democracies such as Australia. Public discourse promotes the idea that Australia as a nation, has become race-blind, inclusive and tolerant as the racial barriers and laws that explicitly discriminated against Indigenous people and kept Australia white, have been eliminated. Australia promotes itself as an egalitarian society based on a fair go for all, a society in which equal opportunity enables meritocracy to flourish. Therefore 'race' appears to matter little in the distribution of resources such as jobs, power, wealth, land and social prestige. The assumption is that society operates according to neutral, rational and just ways of distributing resources.

4. As a civilised nation Australia has the Racial Discrimination Act 1975 to deal with the misconduct of individuals who have transgressed the norm by their overtly racially discriminatory behaviour. By reducing racism to the transgressive behaviour of a few individuals Australian law acknowledges racism while insisting 'on its irregular occurrence and limited significance. Liberal race reform [in the form of the Racial Discrimination Act 1975 has] thus served to legitimise the myth of [Australian] meritocracy' and equal opportunity (Freeman 1995:29-32). Racial discrimination in Australia is not associated with the unacknowledged culturally sanctioned beliefs that defend the advantages white people have because of the theft of Indigenous lands. The *Racial Discrimination Act* 1975 provides no legal redress for the extinguishment of native title in the context of the *Native Title Act* 1993, as amended, where native title is the only title that can be extinguished by other tenures (Aboriginal and Torres Strait Islander Social Justice Commissioner 2002:79).

5. Race has shaped the development of Australian law just as it has influenced the morphology of law in other former colonies, such as the United States, where a body of critical race theory has emerged to reveal the racialisation of law. In this paper I reveal how the possessive logic of patriarchal white sovereignty works ideologically, that is it operates at the level of beliefs, and discursively at the level of epistemology, to naturalise the nation as a white possession. Australia was acquired in the name of the King of England. As such patriarchal white sovereignty is a regime of power that derives from the illegal act of possession and is most acutely manifested in the form of the Crown and the judiciary. The crown holds exclusive possession of its territory, which is the very foundation of the nation-state. The nation-state in turn confers patriarchal white

sovereignty on its citizens through what Carol Pateman argues is the sexual contract (1988). However, not all citizens benefit from or exercise patriarchal white sovereignty equally. Race, class, gender, sexuality and ableness are markers that circumscribe the performance of patriarchal white sovereignty by citizens within Australian society. The possessive logic of patriarchal white sovereignty is predicated on exclusion; that is it denies and refuses what it does not own - the sovereignty of the Indigenous other. Here I use the concept 'possessive logic' to denote a mode of rationalisation, rather than a set of positions that produce a more or less inevitable answer, that is underpinned by an excessive desire to invest in reproducing and reaffirming the nation-state's ownership, control and domination. As such it is operationalised to circulate sets of meanings about white ownership of the nation, as part of common sense knowledge, decision making and socially produced conventions.

6. The possessive logic of patriarchal white sovereignty is deployed to promote the idea of race neutrality through concepts attached to the ideals of democracy such as egalitarianism, equity and equal opportunity. This allows patriarchal white sovereignty to remain transparent and invisible - two key attributes of its power. Yet as the premise of white national identity it defines 'the human condition…it alone defines normality and fully inhabits its' (Dyer 1997:9-10). The law in Australian society is one of the key institutions through which the possessive logic of patriarchal white sovereignty operates. White patriarchs designed and established the legal and political institutions that control and maintain the social structure under which we now live. White Anglo heterosexual, abled and middle class males are overly represented in government, legislatures, bureaucracies, the legal profession and the judiciary where 'they shape legislation, administration and judicial texts in their own image and to their own advantage' (Thornton 1995:88).

7. For over two hundred years the possessive logic of patriarchal white sovereignty has served to define the attributes of person-hood and property through the law. The theft of Indigenous lands was ratified by bestowing and 'acknowledging the property rights of whites in [Indigenous lands]. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights' (Harris 1995:278). The possessive logic of patriarchal white sovereignty was deployed in defining who was, and who was not, white, conferring privilege by identifying what legal entitlements accrued to those categorised as white. At the beginning of the twentieth century this same logic was operative making whiteness itself a visible form of property in Australian law through the Immigration Restriction Act of 1901, and at the commencement of the twenty-first century it continues to function invisibly informing the legal exclusion of refugees. The possessive logic of patriarchal white sovereignty operates to discriminate in favour of itself, ensuring it protects and maintains its interest by the continuing denial and exclusion of Indigenous sovereignty. This logic is evident in the High Court's Yorta Yorta decision.

8. The High Court decision on the Yorta Yorta's appeal of the Full Federal Court's determination on their native title consisted of four separate judgements. The majority decision was a combination of three judgements: a collective judgement by Gleeson, Gummow and Hayne and individual judgements by McHugh and Callinan. Kirby and Gaudron together gave a dissenting judgement upholding the Yorta Yorta's appeal. I begin by summarising some of the key points made in each of the Judges' determinations regarding 'tradition', 'occupation', 'continuity' and the role of the common law.

9. Gleeson et al began their judgement by stating that 'much of the argument of the present appeal was directed to what is meant by par (C) in section 223 (1) of the *Native Title Act*' (Gleeson et al 2001: para 28). This section states that native title rights and interests are defined as

> The communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> c) the rights and interests are recognised by the common law of Australia (Gleeson et al 2001: para 10).

Gleeson et al stated that the Yorta Yorta argued on appeal that the Full Court of the Federal Court had made the same error in law that Olney J had made in his decision. That is, they misconstrued and misapplied the definition of section 223 (1) of the *Native Title Act*. The error was the requirement of positive proof of continuous acknowledgement of traditional laws and customs. In arguing their case the Yorta Yorta stated that 'attention should be directed to the rights and interests presently possessed under traditional laws presently acknowledged and customs presently observed, and to a present connection by those laws and customs (Gleeson et al 2001: para 28).

10. Gleeson et al responded to the Yorta Yorta submission in a number of ways. Because they found that native title is not a creature of the common law, they argued that it is the *Native Title Act* that should be used for a determination of native title. They reasoned that after the Crown acquired sovereignty there could be no parallel law making system operating in Australia. Therefore the rights and interests to which the *Native Title Act* refers are those derived from a normative system of Indigenous society, which existed before white sovereignty. According to Gleeson et al, the concept of society 'is to be understood as a body of persons united in and by its acknowledgement and observance of a body of law and customs' (2001: para 49). They held that if the normative system ceases to exist then so does native title. However, should the content of the laws and customs be adopted by a new society then they are not the same as those that existed at pre-sovereignty. Gleeson et al's reasoning supported the findings of the primary judge and the Full Federal court. They disagreed with the dissenting Judge of the Federal Court's argument that 'no proper allowance [had been made] for adaptation and change in traditional law and customs in response to European settlement'. They maintained that 'what is the most reliable evidence about that subject was quintessentially a matter for the primary judge…The assessment he made of the evidence was one which no doubt took account of the emphasis given and reliance placed by the claimants on the writings of Curr (2001: para 63).

11. They support Olney's view that as Curr's evidence did not concur with the testimony of many claimants regarding traditions and customs, his testimony could be considered credible and compelling. And they agreed that when the Yorta Yorta moved onto the Maloga mission and presented the Crown with a petition for land, in which they acknowledged their lands were inhabited by whites, their connection to land was interrupted (2001: para 69). This was further supported by Olney's findings of the Yorta Yorta that while at Maloga 'the evidence was silent about the continued observance…of

those aspects of traditional lifestyle to which Curr had referred' (2001: para 66). Gleeson et al accepted Olney's findings, that some of the claimants were identified as having been descended from the Indigenous inhabitants who were in possession of the area under claim in 1788.

12. Despite this acknowledgement of descent, the assumption that the nation is a white possession manifests itself in Gleeson et al's decision in a number of ways. First, they rationalise that only the law making system of patriarchal white sovereignty can exist as such once sovereignty has been asserted. This is done by arguing contrary to the reasoning in Mabo 2 where it is acknowledged that native title was progressively extinguished by freehold title and as such Indigenous law making systems continued to function. Thus there is a refusal to acknowledge the Indigenous sovereignty that was implicit in Mabo. Second, they assume that Indigenous law and custom is only constituted through a normative system made up of a body of persons who acknowledge and observe them collectively and was used to negate native title. This assumption is inconsistent with Indigenous knowledge about how law and custom work. Traditional law and custom in Indigenous societies does contain a normative system of rules but they are intrinsic to an inter-substantiation of humans, ancestral beings and land. Indigenous people are the human manifestations of the land and creator beings, they carry title to the land through and on their bodies. Thus the physicality of Indigenous people is testimony to the existence of particular tracts of country. The relationship between people and their country is synonymous and symbiotic. This is why the connection to land is never broken and why no other Indigenous group claimed or could claim Yorta Yorta country. Third, Gleeson et al's reliance on the primary judge's interpretation of the evidence, despite not having assessed it themselves, is based on the assumption that he knew what was traditional law and customs and whether there was a continuity of these albeit in evolutionary form. Rather than the appellate Court receive and make its own assessment of the evidence, as a matter of orthodoxy it relied on the primary judge's assessment to inform their decision. Despite their insistence upon objectivity, Gleeson et al based their findings on the primary judge's interpretation of Curr's interpretation of Yorta Yorta culture (Buchan 2002). They cloaked their possessiveness through assuming the epistemological privilege of defining who Indigenous people are and that to which we are entitled. This is also evident in their findings that the petition for the return of land put forward by the Yorta Yorta at Maloga revealed the Yorta Yorta's acknowledgement of their dispossession. The Yorta Yorta did not cede their sovereignty anywhere in writing in the petition, instead they asked for the return of their property, which was illegally taken. Under the law of patriarchal white sovereignty, when a thief steals someone's property ownership is not assumed or inferred as being ceded to the thief. To the contrary the law preserves ownership and guarantees return of the property to the owner. This principle in law was not applied to the Yorta Yorta's use of the petition, instead the findings by Gleeson, Gummow and Hayne fundamentally represented the Yorta Yorta as a people without any proprietary rights in land.

13. Unlike Gleeson, Gummow and Hayne, Justice McHugh presented a very short determination in which he argued that the High Court has narrowly interpreted 223 of the Native Title Act because parliament believed that native title would depend on the developing common law (2001: para 129). He held that

> parliament intended native title to be determined by the common law principles laid down in Mabo v Queensland [No 2] [68], particularly those formulated by Brennan J in his judgement in that case. When s223 (1) (c) of the 1993 Act referred to the rights and interests "recognised by the common law of Australia", it was…referring to the principles expounded by Brennan J in Mabo [No2] (2001: para 133).

However, he states that 'this Court has now given the concept of "recognition" a narrower scope than I think the Parliament intended, and this Court's interpretation of s223 must now be accepted as settling the law' (2001: para 134). McHugh could have dissented on this determination but choose instead to follow Gleeson et al. By restricting the concept of "recognition" to statute law McHugh and Gleeson et al denied the Yorta Yorta's argument based on recourse to the Common Law which has recognised Indigenous sovereignty in countries such as Canada. McHugh's rationalisation for adhering to this narrower interpretation is tied to his desire to maintain the national status quo rather than following precedent. McHugh's investment in possession operates discursively ensuring compliance and solidarity when it is perceived that the nation requires protection from the threat of Indigenous sovereignty in international common law.

14. Justice Callinan presented a lengthy determination quoting extensively from the primary judge, Justice Olney. Callinan agreed with the findings of the Full Federal Court arguing that the Yorta Yorta did not identify their rights and interests in land according to traditional laws and customs which could be recognised by the common law (2001: para 174). He stated that the Yorta Yorta were disadvantaged by

> Loss of traditional knowledge and practice because of dislocation and past exploitation; and, by reason of the lack of a written language and the absence therefore of any indigenous contemporaneous documents, the need to rely extensively upon the spoken word of their forebearers, which, human experience knows is at risk of being influenced and distorted in transmission through the generations, for example, fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest. Anthropologists' reports, which also relied to a large extent on transmitted materials were liable to suffer from similar defects as well, in this case, as his Honour held, as some lack of objectivity ordinarily to be expected of experts. A further complication was that some witnesses on behalf of the appellants, understandably resentful of past dispossession, made emotional outbursts and failed to give evidence which could be of assistance to the Court (2001: para 143).

15. He further held that, as there was no precision in identifying traditional laws and customs, then the common law could not give effect or enforcement to them. He too found that native title is not a creature of the common law but combined with the role of the *Native Title Act* it protects and gives effect to it. In relation to section 223 (1) he states that the 'use of the word "connection" contemplates at least a degree of continuity either of acknowledgement or observance, and possession, except arguably perhaps in exceptional cases, of which this does not appear to be one' (2001: para 174). And as the Act 'makes for no provision for non-extinguishment, or revival of native title…this is an indication of a need for continuity' (2001: para 181). In relation to 'tradition' he notes that the Act sets out the process by which an application can be made for native title. It includes the Registrar of the Native Title Tribunal being satisfied that there is a traditional physical connection with land or water that suggests that there is a 'need for an actual presence on the land' (2001: para 184). Referring to the Oxford dictionary for a definition of 'tradition' he offers the following advice.

> Tradition, myth and legend are often indistinguishable, but mere existence of either of the latter, in the sense of a fictitious narrative, or an unauthentic or non-historical story, however venerated by

repetition, will not suffice of itself to establish native title rights and interests possessed under traditional laws or customs by people claiming a relevant connection to land (2001: para 185).

16. He maintained that in order for the common law to recognise rights and interests they must be found in traditional laws or customs and they must be connected to land 'for their enjoyment a physical presence is essential' (2001: para 186). He notes that the traditional laws and customs that existed at sovereignty must be the ones that have continued and 'the extent to which longstanding law and custom may evolve without ceasing to be traditional raise difficult questions' (2001: para 187). Callinan asserted that the matter went uncontested in Yanner v Eaton [105]. Referring to the Yanner case he reasoned that 'for myself I might have questioned whether the use of a motor boat powered by mined and processed liquid fuel, and a steel tomahawk, remained in accordance with a traditional law or custom, particularly one of alleged totemic significance' (ibid). He then, without exploring any evolutionary aspect of Yorta Yorta tradition and customs, concurs with Justice Olney and the Full Federal Court that the appellants could not establish continuity. In conclusion he reiterates, in relation to the oral evidence as assessed by the trial judge, that due weight had been given to the oral evidence but that it was not sufficient to refute contemporaneous records to the contrary (2001: para 190). He found that Olney had not made an error in finding a lack of continuity because farming on both sides of the Murray were incompatible with the traditional way of life or any evolution of it. He further held that Olney did not have to refer to all the evidence upon which the parties relied and it was sufficient for Olney to refer only to that evidence which he assessed as relevant or necessary for his decision (2001: para 191).

17. Callinan's perceptions of the disadvantages faced by the Yorta Yorta are not predicated on the rule of law; rather they are connected to an epistemological privilege tied to possession that served to undermine both the oral testimony of the Yorta Yorta and the expertise of white anthropologists. His claim that there was a lack of objectivity is based on the assumption that, where the oral evidence is not corroborated by the white written record, it is unreliable. Despite the basis of Curr's evidence – his observations and judgements as an amateur ethnographer - being outside Yorta Yorta culture, his written words are granted authority. Callinan does not convincingly explain why Curr is treated as such an authority; instead he accepts this authority to suit his investment, which is also evident in how he diminishes the testimony of the Yorta Yorta and anthropologists. He implies that the Yorta Yorta and their experts are unreliable witnesses prone to embellishment, emotion and self-interest. And where he concludes that the trial judge found no written evidence at all to suggest that the Yorta Yorta continued their traditions and customs, such as at the Maloga mission, he held that they were discontinued. For Callinan the lack of evidence becomes evidence in itself. Callinan selectively chooses evidence to suit his self-interest; the refusal of Yorta Yorta sovereignty. For example, he refers to an administrative procedure, based on an interpretation of the *Native Title Act*, to state that a physical presence is required to prove connection to land when the Act makes no such stipulation. By elevating an administrative procedure to a legal criterion he is able to dismiss the Yorta Yorta's claims on the basis of no physical presence. The idea that you have to have a physical presence on the land to enjoy one's entitlements is based on conceptions of white property ownership, which requires evidence of human occupation in the form of fences, title deeds or residences. For Callinan, signifiers of white possession are imputed as the only measure of Indigenous possession. His investment in white possession is further revealed through the way in which he deploys 'tradition'. He refers to the Oxford dictionary's definition, which he finds is insufficient to establish Indigenous possession. Then, although alluding to the idea that he may not know what the evolving tradition and customs might be, he authoritatively states it is questionable to apply it to the use of a motor boat and steel tomahawk as in the Yanner case. In effect he defines 'tradition' by what it is not, rather than providing a definitive statement of what it is, as a way of refusing Indigenous possession and therefore Indigenous sovereignty. Callinan's static construction of Indigenous culture effectively denies traditional laws and customs as they are now practised. He privileges certain written documentation over the oral and written evidence presented on behalf of the Yorta Yorta and represents them as being self-interested, highly emotive and mendacious. Callinan's refusal of Yorta Yorta sovereignty penetrates his findings.

18. Justices Gaudron and Kirby in their determination also reasoned that native title is not a creature of the common law and held that statutory interpretation of the Native Title Act was required for any determination of native title, particularly s223 (1). They disagreed that it was necessary 'to establish that those rights and interests have been continuously availed of in relation to land, or, even that they are presently availed of' (2001: para 103). They further argued that s223 (1) b 'requires only that there be a present connection to land and waters. The terms of s223(1)(b) also indicate the nature of the requisite connection, namely, "by [the traditional] laws and customs [acknowledged and observed"' (2001: para 104), not a physical connection or continuing occupancy. They argued that 'spiritual connection by laws acknowledged and customs observed falls comfortably within the words of s223 (1) b' (2001: para 104). They found that section 223 (1) (c) does not give expression to the 'notion of continuity as a traditional community' only that the rights and interests be recognised by the common law (2001: para 109). In their view, continuity of a community is 'primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question' (2001: para 117). They found that the preamble to the *Native Title Act* acknowledged the history of dispossession. Traditional laws and customs should have their origins in the past. However, 'to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs' (2001: para 114). They held that Olney was misdirected in requiring the Yorta Yorta 'to identify acknowledgement of laws and observance of customs with respect to the utilisation or occupation of land' (2001: para 122). They stated that s223 (1) (a) and (b) of the Native Title Act does not contain a requirement that 'the traditional connection with the land…be substantially maintained'.

19.The dissenting judgement by Gaudron and Kirby constituted nine pages out of the eighty-four pages of the decision and it appears to contest the possessive logic of patriarchal white sovereignty. Their broad approach to interpreting the *Native Title Act* acknowledged several possibilities for the existence of native title in modern form. However, they like the other judges, reaffirmed white possession of the nation in their decision making by denying the fundamental role of the common law. Perhaps this is because Gaudron and Kirby hold that the nation, as the anchor of patriarchal white sovereignty, is destabilised by the incremental process of native title claims. Neither Gaudron nor Kirby are able to detach the technicalities of legal argument posed by the common law from the legitimacy of the nation as such. By not drawing on any common law cases as precedent, including the Mabo 2 decision, they restricted native title to

statutory interpretation. In doing so they refused the finding in the Mabo 2 decision: the Crown's acquisition of sovereignty provided Indigenous people with common law rights as British subjects.

20. Pearson argues that s223 (1) of the *Native Title Act* does not diminish, but preserves the common law meaning of native title. The High Court's interpretation of this section fundamentally abridges its meaning and mitigates the intention of Parliament as stated in McHugh's decision and the preamble to the Act. Pearson argues that 'at the heart of this whole misconception is our understanding of how the common law treats traditional indigenous occupants of land when the Crown acquires sovereignty over their homelands' (2003:19). In the Mabo 2 decision the Justices held that when the Crown asserted sovereignty, the indigenous people of Australia became subjects of the Crown and as such entitled to the protection of the imported Common law which extended to protection of existing property rights. Pearson argues that 'it is the fact of occupation that excites recognition and protection by the common law. Possession is the conclusion of law that follows from the fact of occupation…it is the occupation of land that the common law recognises and protects in the first instance' not traditional laws and customs (2003: 22). Traditional laws and customs identify entitlement and territory, allocate rights, interests and responsibilities within communal possession and regulate their exercise by community members. According to Pearson

> When you approach the question of what continues after annexation by answering the rights and interests established by traditional law and custom – rather than by answering that it is the right to occupy land by authority of, and in accordance with, one's traditional laws and customs – this has profound implications for the way in which one conceptualises native title and ultimately, how one deals with proof (2003: 25).

21. The High Court, by not discussing the body of case law dealing with native title within the common law, avoided legal definitions of 'tradition', 'continuity' and 'connection' established within such case law. In dealing with native title as defined in s223 (1) of the *Native Title Act*, the High Court ruled on 'important questions and principles on the basis of bare assertion, rather than…"the time-honoured methodology of the common law" whereby cases are ruled upon according to established and developing precedents' (Pearson 2003: 27-9). The possessive logic of patriarchal white sovereignty inherent in the High Court's decision has produced an outcome whereby its accumulation of titles is unaffected and Indigenous people's property rights are reduced to a co-existing and deferential title. Indigenous people now face an unrealistic and inflexible burden of proof to meet 'white Australia's cultural and legal prejudices about what constitutes "real Aborigines"' (Pearson 2003:7).

Conclusion

22. The possessive logic of patriarchal white sovereignty operated discursively and ideologically in the Yorta Yorta decision to produce legal and political resistance to native title by creating judicial and legal impediments that were presented as though they are race blind. Yet, the origin and assertion of property law in Australia continues to be based on racial domination. The intersection between race and property continues to play a definitive role in constructing and affirming Indigenous dispossession. The denial of the Yorta Yorta's native title was based on a regime of statutory interpretation that usurped the common law property rights of Indigenous people. By the fact of occupation under Australian common law the Yorta Yorta proved their native title. This is inconsistent with the High Court 's majority decision that 'only white possession and occupation of land was validated and therefore privileged as a basis for property rights' (Harris 1995:277-8). The High Court required evidence of traditional law and customs derived from Indigenous sovereignty that existed prior to patriarchal white sovereignty, but chose to define them by what they are not through the *Native Title Act*. The High Court refused the continuity of Indigenous sovereignty as the precondition and genesis of all concomitant rights, interests, entitlements, responsibilities, obligations, customs and law.

23. This refusal resulted in the High Court's majority decision, which reinterpreted Olney's decision through the appeal by the Yorta Yorta, to validate divesting them of their land. The High Court majority decision rationalised Yorta Yorta adaptation of white culture, which was necessary for their survival as a society and nation, as proof that they had surrendered both their Indigeneity and sovereignty. In doing so the High Court imputed reified white social standards to the Yorta Yorta which 'not only denied their right to historical change but also the reality of their paradoxical continued existence' in white Australia (Torres & Mulin 1995: 186). In the High Court's majority decision, concepts such as 'tradition', 'continuity' and 'connection' became socio-legal constructs that took on a pseudo-objective form, which holds no meaning or place in the law of the Yorta Yorta. The High Court's decision holds that 'definition from above can be fair to those below, that beneficiaries of racially conferred privilege have the right to establish norms for those who have historically been oppressed pursuant to those norms' (Harris 1995:287).

24. In the High Court's decision the evidence and legal interpretation by and of white men were raised to a sublime position of authority. Thus 'reflecting the power inherent in legal discourse to corrupt meaning as well as the role of legal translation in that process' (Torres & Mulin 1995:188). The High Court's judges' claims to objectivity served to mask the racialisation of their knowledge and its partiality. The possessive logic of patriarchal white sovereignty was omnipresent, but invisible, unnamed and unmarked in this decision, appearing to be disinvested when protecting its sovereignty. Despite the High Court's decision, the bloodline to country of the Yorta Yorta continues to carry their sovereignty. Indigenous sovereignty invokes different sets of relations, belonging and ownership that are grounded in a different epistemology from that which underpins the possessive logic of patriarchal white sovereignty. This is why Yorta Yorta sovereignty will continue to unsettle and challenge the possessive logic of patriarchal white sovereignty and its premise that adverse possession is nine tenths of law.

Dr. Aileen Moreton-Robinson is a Geonpul woman from Quandamooka (Moreton Bay). Previous to her appointment as Australian Research Council Postdoctoral Fellow she taught Indigenous studies at Griffith University in Brisbane and Women's Studies at Flinders University in Adelaide. She has been involved in the struggle for Indigenous rights at local, state and national levels and has worked for a number of Indigenous organisations. Her writing in the area of native title, whiteness, race and feminism has been published in anthologies and journals here and abroad. Her current research investigates Indigenous social constructions of whiteness and she is President of the Australian Critical Race and Whiteness Studies Association. Email: a.moretonrobinson@uq.edu.au

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to top of page

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